

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5137 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

KANTILAL M SATHWARA

Versus

STATE OF GUJARAT

Appearance:

MR Mehul Vakharia for Mr KG VAKHARIA for Petitioner
Mr B Y Mankad, instructed by Mr R J Oza for
respondents No.1 & 4
Notice served for Respondent No. 2 & 3

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 24/03/2000

ORAL JUDGEMENT

This is a petition under Articles 14, 16 and 226
of the Constitution of India for appropriate writ, order

or direction, quashing and setting aside Notification dated 12.7.1989 at Annexure 'A' issued by the first respondent so far it relates to giving of promotion to the third respondent. The petitioner has also prayed for appropriate writ, order or direction directing the respondents No.1 and 2 to give promotion to the petitioner to the post of Class II cadre in Gujarat Development Services Class II.

2. The facts of the case of the petitioner emerging in the petition may be stated as follows:

As per the case of the petitioner, he was recruited as Stenographer in Mehsana District Panchayat in June, 1989. He has passed Government Commercial Certificate Examination. He has passed the requisite examinations for his appointment as Stenographer as per the Stenographer, Steno-typist and Typist (Panchayat Service) Recruitments (Examinations) Rules, 1973. That thereafter, the petitioner was posted as P.A. to the District Development Officer of Mehsana District Panchayat and at the time of institution of the petition he was working as such at Mehsana. The petitioner also submitted in the petition that as per the Rules, Class III employees working in the Panchayat Cadre can be promoted to the post of Class II namely; Taluka Development Officer. That the said cadre is known as Gujarat Development Services Class-II. That as per the policy and rules of the respondent, promotion from class III cadre to class II are issued on the basis of seniority as well as eligibility criteria. The petitioner claims that he was eligible for being promoted to class II cadre. That though his name appeared in the seniority list at sr.no. 329 and though name of respondent No.3 appeared at sr.no.333 in the said seniority list published on 10.1.1989, respondents No. 1 and 2 promoted respondent No.3 to the class II cadre, though he was junior to the present petitioner. The petitioner states that there was no reason to bypass the petitioner by promoting his junior to class II cadre. The petitioner, therefore, challenges the said action on the part of respondents No. 1, 2 and 4 and claims that he should be promoted from the date on which his junior was promoted to the aforesaid cadre. The petitioner has, therefore, prayed for appropriate writ, order or direction quashing and setting aside the aforesaid notification dated 12.7.1989. The petitioner also claims that he should be promoted in class II cadre from the date on which his junior was promoted. Similar interim relief was claimed but it appears from the record that it was not granted to the petitioner vide order dated

19.8.1989 of this Court. Pursuant to the notice issued by the Court, the respondents have filed affidavit of Mr V J Moria, Asstt. Development Commissioner at page 25. There it has been contended that in the matter of drawing false bill of Leave Travel Concession, investigation was undertaken by the A.C.B., Ahmedabad against the petitioner and other employees who were serving in the District Panchayat, Mehsana at the relevant time. That on the basis of investigation report, the Vigilance Commission has recommended to lodge criminal complaint against the petitioner and for granting sanction for prosecution against the petitioner. That the persons against whom the prosecution was pending were required to be considered for promotion. Therefore, sealed cover procedure was required to be followed as per Government circular dated 23.9.1981. That the case of the petitioner was accordingly considered and the finding of the Selection Committee has been kept in sealed cover. That therefore, the orders of the respondent promoting respondent No.3 bypassing the petitioner was perfectly legal and valid. That in view of the above position, the petition be dismissed against the respondent.

3. Thereafter, the petitioner has filed affidavit-in-rejoinder at page 36. There the petitioner has denied that the investigation was undertaken by the A.C.B. against him. He has also contended that he has not obtained any false LTC claim and even if there is some irregularity committed in drawing LTC claim, the Government has issued circular dated 3.8.1988 and on account of the said circular, no proceedings are required to be undertaken against him. On the strength of the above material, I have heard the learned Advocates for the parties and have perused the papers. It is the case of the petitioner that he was senior and yet his junior was promoted. These facts are not very much in dispute. In fact, the seniority list has been produced by the petitioner at page 21 of the petition. If we have a look at the seniority list, we can find that the name of the petitioner has been found at sr. No.329 and name of respondent No.3 will be noticed at sr.no.330 meaning thereby that the petitioner was shown to be senior to respondent No.3 in the seniority list of 1989. This fact has not been seriously disputed even in the affidavit of Mr V J Moria at page 25. It is, therefore, clear that the petitioner was senior, at the relevant point of time, to respondent No.3. If we turn to notification dated 12.7.1989 at page 17, we find that certain persons were promoted from Panchayat Services Cadre III to Gujarat Development Services Cadre II. At page 18 of the petition name of respondent No.3 will be found at

sr.no.3. That order shows that respondent No.3 has been promoted to class II cadre.

4. It is true that the orders indicate that these are provisional orders and the persons concerned will be liable to be reverted without notice. But it will also be noticed that the said order of promotion has been issued after following due procedure and in that sense it is a regular order of promotion. It therefore, becomes clear that the petitioner was not promoted when his junior was promoted.

5. Then, the explanation of the respondent found in the affidavit of Mr V J Moria at page 25 is that some wrong was committed by the petitioner, inasmuch as he claimed false LTC during the course of his employment. The affidavit further goes to show that this was the subject matter of the investigation through A.C.B. However, this was a matter of 1989 and even in 2000, it is not clear as to what happened to the said investigation. Learned Advocate for the petitioner has categorically made a statement before the Court that there is no investigation pending nor there was such investigation in the past. It is also made clear that no charge-sheet has been filed against the petitioner and no departmental enquiry has been initiated against the petitioner. Even if there was some allegation against the petitioner that he has drawn amount of LTC against the provisions of rules dishonestly, even till today, no enquiry has been conducted and the petitioner has not been charge-sheeted for any amount of misappropriation or like that. When more than 10 years have passed and when no action has been taken against the petitioner, there are reasons to believe that the respondents have no case against the petitioner either for regular departmental enquiry or for issuing charge-sheet before appropriate criminal court. This means that the petitioner has been deprived of promotion without any proof against him. Even if we take it that sealed cover process was undertaken and within that time respondent No.3 was promoted. But it was a matter of 1989. Thereafter the petitioner has retired and even respondent No.3 has also reportedly retired. Till the retirement of these two persons, the matter has not been finally set at rest. This would clearly mean that the respondents have not acted promptly or within reasonable time limit. Any way, it is very clear that the petitioner has been deprived of right of promotion without any reasonable excuse. The only explanation coming from the mouth of the respondent is that there was investigation for wrongful claim of LTC but as said above, this has not resulted in submission of

charge-sheet. Even the departmental enquiry has not been conducted against the petitioner. Even when the petitioner retired from the service, no order appears to have been passed to the fact that the retirement will be subject to the result of the departmental enquiry which may be conducted even after the retirement of the petitioner. Since no charge-sheet has been filed till today, it can be said that there is no scope for filing charge-sheet against the petitioner. So on the one hand, no departmental enquiry has been conducted against the petitioner, on the other hand, no departmental enquiry appears to be contemplated against him. No charge-sheet has also been filed against him. In that view of the matter, it is the legitimate grievance of the petitioner that he has been deprived of his right of promotion illegally.

6. These facts have not been explained by the respondents. The respondents have not explained as to what happened to the criminal investigation. It is also not explained as to why no departmental enquiry has been conducted against the petitioner. It is also not made clear as to why the petitioner was allowed to retire without any order of departmental enquiry at least at the eve of the retirement of the petitioner. This makes it clear that the petitioner was senior to respondent No.3 at the relevant point of time in 1989 and yet he was deprived of promotion on the aforesaid grounds. But these grounds are not well-founded and, therefore, it has to be held that the petitioner was deprived of promotion without any reasonable explanation. Consequently, the said action of the respondents depriving the petitioner on his right of promotion is illegal and therefore, it is required to be quashed and set aside.

7. Learned AGP for the respondents has taken me through the affidavit of the Assistant Development Commissioner. But as said above, it does not state as to what ultimately happened to the allegations made against the petitioner that he wrongfully collected LTC amount. Therefore, it is not clear as to what happened to the said allegations and hence it cannot be said that the allegations were proved or there was prima facie case against the petitioner for conducting the departmental enquiry. The learned AGP also submits that as per the opinion of the ACB, there was a case against the petitioner and, therefore, it was recommended that prosecution should be launched against him. However, this fact is not borne out from the materials made available to the Court. Therefore, even if the affidavit and documents produced were true and even if the A.C.B.

had conducted investigation and had opined against the petitioner, there is nothing on record to show as to what action has been taken by the Government in pursuant to the said recommendation of the A.C.B. Any way, it is very clear that the petitioner was deprived of his promotion without any reasonable excuse and, therefore, the said action on the part of the respondent is illegal.

8. Consequently, the petitioner appears to be right when it has been argued that the notification dated 12.7.1989 promoting respondent No.3 to class II cadre bypassing the petitioner should be set aside. The petitioner has claimed that the respondent should be directed to promote the petitioner. However, in my view, since we do not have any other material on record, it would not be possible or even legally permissible to issue directions to the respondent to promote the petitioner. Therefore, proper direction to be issued would be to consider the petitioner's case for promotion as on 12.7.1989 when his junior was promoted, naturally and necessarily, if he is found fit and suitable and if he has not yet been promoted to higher post. He would also be entitled to further benefits which may be available to him on and after the promotion.

9. In the aforesaid view of the matter, this petition is partly allowed and the impugned notification dated 12.7.1989 placed at page 17 is quashed and set aside so far as it relates to omitting the name of the petitioner and bypassing him while promoting his junior-respondent No.3 at sr.no.3 at page 18 is concerned. Respondents No.1, 2 and 4 are hereby directed to reconsider the case of the petitioner for his promotion as on 12.7.1989 and in case the petitioner is found to be fit and suitable for the promotion, his name shall be placed above the name of respondent no.3 at page 18 in the said notification. In case the petitioner is found fit, he may be promoted as aforesaid retrospectively from the date of earlier notification dated 12.7.1989. He shall be entitled to further consequential benefits as may be available to him as per rules. Respondents No.1, 2 and 4 shall consider and decide the case of promotion of the petitioner within two months from the date of receipt of this order, in the light of the background of the observations made hereinabove.

Rule is made absolute to the aforesaid extent. In the facts and circumstances of the case, no order as to costs. Direct Service is permitted.

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msp